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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 898

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, et al.,
Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION TO AFFIRM

Pursuant to Rule 16, paragraphs 1(c) and 1(d), of the Revised Rules of this Court, Rocky Mountain Motor Tariff Bureau, Inc., moves that the unanimous judgment of the district court be affirmed on the following grounds:

1. The questions on which the decision depends are so unsubstantial as not to need further argument.

2. The appellants failed to exhaust their administrative remedies.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court which dismissed appellants' complaint seeking to have the court declare that rates and charges in tariff schedules on file with the Interstate Commerce Commission are unlawful and that the lawful rates

and charges are those in schedules which were in effect prior to July 14, 1967. The appellants also asked the court to vacate and set aside certain procedural orders of the Interstate Commerce Commission.

Shortly prior to their filing of the complaint in the district court, the appellants had filed petitions with the Interstate Commerce Commission asking the Commission to suspend or to reject the tariff schedules that had been filed with the Commission and scheduled to become effective August 29, 1967. The Commission determined that the schedules should not be suspended or rejected and permitted them to become effective. There was no hearing before the Commission at which the parties presented evidence and none of the Commission's orders or decisions was adjudicative. Thus, the appellants asked the district court, without the benefit of the Commission's expertise and in the absence of any evidence, to make an initial determination that the rates were unlawful.

On July 12, 1967, the Commission had suspended in Investigation and Suspension Docket No. M-21610, *Rate Increases, Rocky Mountain & Transcontinental Terrs.*, tariff schedules setting forth increased rates and charges in the tariffs involved in this proceeding and nine other tariffs (JS 6a). The second and fourth ordering paragraphs of the Commission's order read:

> *It is further ordered,* That the operation of the said *schedules* be and it hereby is suspended, and that the use thereof in interstate and foreign commerce be deferred to and including February 14, 1968, *unless otherwise ordered by this Commission.*
>
> *It is further ordered,* That neither the *schedules* hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, *unless otherwise ordered by the Commission.* (Italics supplied)

The motor carriers decided to withdraw and cancel the tariff schedules that had been suspended and to re-examine their position in the light of additional data which had become available. Pursuant to an order of the Commission designated as Special Permission No. M-94200, dated May 3, 1955, as amended, the motor carriers published new tariff schedules cancelling all of the schedules that had been suspended in Investigation and Suspension Docket No. M-21610. Thereafter, the Commission, Board of Suspension, issued an order dated August 16, 1967, which discontinued the proceeding in I. & S. Docket No. M-21610 after finding that the respondents under special permission had filed schedules cancelling the schedules under suspension (JS 9a, 10a). The Commission, division 2, denied a petition filed by two of the appellants for reconsideration of the order discontinuing the proceeding.

The motor carriers published new tariff schedules providing for a general increase in rates and charges against which the appellants filed their petitions for suspension. Before the publication was made, the Interstate Commerce Commission specifically approved the form of those schedules by its order designated as Special Permission No. 68-383-M (Exhibit 12 attached to complaint).

The appellants asked the district court to enter its order and decree enjoining, annulling, setting aside and vacating the order of the Commission, Board of Suspension, dated August 16, 1967, in I. & S. Docket No. M-21610 and urged that the Commission's actions in granting special permission orders and permitting short notice cancellation of previously suspended schedules were arbitrary, capricious and a clear abuse of discretion (Complaint, paragraphs 7.04 and 5.11).

The appellants failed to introduce in the district court a certified copy of the record of the proceedings before the Interstate Commerce Commission or of any part of that record.

ARGUMENT

The Interstate Commerce Commission has primary jurisdiction. *Mississippi Valley Barge Line Co. v. United States,* 292 U. S. 282, 286-7 (1934); *United States v. Illinois Central Railroad Co.,* 291 U. S. 457, 463 (1934); *Meyers v. Bethlehem Shipbuilding Corporation,* 303 U. S. 41, 50 (1938). In *Sprunt & Son, Inc. v. United States,* 281 U. S. 249, 255 (1930) this Court held:

> Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy.

Sections 204 (c) and 216 (e) of the Interstate Commerce Act (49 U.S.C. Sections 304(c) and 316(e)) grant to any person, State board, organization or body politic the right to make complaint in writing to the Interstate Commerce Commission that any motor carrier has failed to comply with any provisions of the Act or any requirement established pursuant thereto, or that any rate, rule, regulation or practice in effect is in violation of the Act. The Commission is empowered to enter upon an investigation to determine the issues raised by the complaint and to enter the appropriate order based upon its findings.

Instead of availing themselves of the administrative remedies accorded by the Act, the appellants filed their complaint seeking to have the district court render a decision on a mattter clearly within the primary jurisdiction of the Commission. *Arrow Transportation Company v. Southern Railway Co.,* 372 U. S. 658 (1963), sustains the district court's holding that the Commission's determination not to suspend is not judicially reviewable. The Commission's decision not to suspend was necessarily a pre-

liminary decision. The appellants could have challenged the lawfulness of the rates, but they failed to exhaust the statutory remedies afforded them.

In the district court the appellants sought judicial review of a number of orders or procedural rulings of the Interstate Commerce Commission, including the orders of the Commission, Board of Suspension, dated July 12, 1967, and August 16, 1967, in Investigation and Suspension Docket No. M-21610, *Rate Increases, Rocky Mountain & Transcontinental Terrs.* On these two orders of the Commission, Board of Suspension, the appellants have attempted to establish the substantiality of the questions they have raised on appeal. A brief analysis of the orders refutes appellants' contentions.

As shown in the second ordering paragraph of the order of July 12, 1967, it was the operation of the designated schedules that was suspended and the use thereof was deferred to and including February 14, 1968, unless otherwise ordered by the Commission. That order further provided in the fourth ordering paragraph that neither the schedules suspended nor those sought to be altered thereby could be changed until the proceeding had been disposed of or until the period of suspension had expired, unless otherwise ordered by the Commission.

All of the schedules that were embraced in the Commission's order of July 12, 1967, were cancelled by other schedules pursuant to the order of the Commission designated as Special Permission No. M-94200. All rates and charges, which were integral parts of the schedules, ceased to exist when the schedules were cancelled.

The order dated August 16, 1967, recited that the suspended schedules had been cancelled pursuant to special permission of the Commission and discontinued the proceedings in I. & S. Docket No. M-21610 (JS 9a and 10a). The Board of Suspension was specifically authorized by the Organization Minutes of the Interstate Commerce Com-

mission to issue the order discontinuing the proceedings (JS 13a). Two of the appellants petitioned for reconsideration of the order discontinuing the proceeding. The Commission, division 2, denied the petition for reconsideration by its order dated August 24, 1967. In that order the Commission specifically found that the schedules the operation of which had been suspended were cancelled in full. The Jurisdictional Statement makes no reference to the order denying reconsideration. A copy of the order is attached hereto as Appendix A.

Although they asked the district court to enjoin, annul, set aside and vacate the order of the Commission, Board of Suspension, dated August 16, 1967 (Complaint, paragraph 7.04), the appellants now recognize the validity of that order. On appeal, they admit that the order served to terminate the investigation and dispense with a hearing (JS 9). The Commission ordered that the "proceedings be, and they are hereby, discontinued" (JS 10a). When all of the schedules that had been suspended in I. & S. Docket No. M-21610 were cancelled, there was nothing to investigate. The issues in that proceeding were moot and the Commission appropriately discontinued the proceeding. The appellants, however, now argue that notwithstanding the discontinuance, the suspension lingered on. The argument is fallacious. The designated schedules were suspended to and including February 14, 1968, unless otherwise ordered by the Commission (JS 7a). That date has long since passed and the Commission did otherwise order.

CONCLUSION

Since this appeal presents no issue warranting plenary consideration and since the appellants failed to exhaust their administrative remedies, the judgment of the court below should be affirmed.

Respectfully submitted,

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January 30, 1969

APPENDIX A

SERVICE DATE
AUGUST 25, 1967

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 24th day of August, 1967.

INVESTIGATION AND SUSPENSION
DOCKET NO. M-21610

RATE INCREASES, ROCKY MOUNTAIN & TRANSCONTINENTAL TERRS.

IN THE MATTER OF A PETITION FOR RECONSIDERATION OF AN ORDER DISCONTINUING THE TITLED PROCEEDING

Upon consideration of a petition filed August 18, 1967, by the National Small Shipments Traffic Conference, Inc., and the Drug and Toilet Preparation Traffic Conference for reconsideration of the order discontinuing the proceeding in Investigation and Suspension Docket No. M-21610, *Rate Increases, Rocky Mountain & Transcontinental Terrs.*, and;

It appearing, That the schedules the operation of which had been suspended by an order in said proceeding, were canceled in full, effective August 4, 1967, and that sufficient grounds have not been presented to warrant the action sought; Therefore,

It is ordered, That the petition for reconsideration of the order of discontinuance entered by the Commission, Board of Suspension, on August 16, 1967, be, and it is hereby, denied.

By the Commission, Division 2, acting as an appellate division.

H. NEIL GARSON,
Secretary

(SEAL)